3/4 No. 691

(30)

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 742.

AXEL HAWKINSON, PETITIONER AND APPELLANT BELOW,

VS.

GEORGE GASTON JOHNSTON, RESPONDENT AND APPELLEE BELOW.

GEORGE GASTON JOHNSTON, RESPONDENT AND APPELLANT BELOW,

VS.

AXEL HAWKINSON, PETITIONER AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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VI. Argument—

I. The total amount in controversy under Missouri law was $400, for one quarter's rent. If surrender of the lease was accepted all liability was discharged. If it was not accepted the maximum possible recovery was $400. Jurisdiction was usurped and due process of law and equal protection of laws was denied by refusal to apply the law consistently declared by the Missouri Supreme Court en banc which denies the doctrine of anticipatory repudiation for leases 19

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Supreme Court of the United States

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No. .....

AXEL HAWKINSON, PETITIONER AND APPELLANT BELOW,

VS.

GEORGE GASTON JOHNSTON, RESPONDENT AND APPELLEE BELOW.

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AXEL HAWKINSON, PETITIONER AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Axel Hawkinson, respectfully shows to this Honorable Court:

A.

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

The Circuit Court of Appeals for the Eighth Circuit affirmed District Court judgment for damages claimed by respondent as owner of two-thirds interest in a Kansas City, Missouri, vacant lot. Judgment was based on alleged anticipatory repudiation of covenants in a 99-year lease for installment payments of quarterly rent and taxes to accrue during ten future years (Tr. 49; opinion 100 to 113). The opinion states (Tr. 103) no Missouri court appears to have passed upon the precise point and (Tr. 104) no Missouri decision purports to have applied the anticipatory breach doctrine to leases as part of the common law as it existed prior to 1607. Opinion Note 6 refers to a few of many authorities declaring the doctrine did not apply to leases at common law (Tr. 104). It overrules them by disregard together with controlling opinions of the Missouri Supreme Court *En Banc*, reference to which is omitted, to rest final decision on a personal philosophy expressed in Opinion Note 23 (Tr. 113). That philosophy contravenes the basic principles of Missouri landlord and tenant law, and conflicts with its declared social and economic state public policy consistently followed since at least 1855. The opinion concedes the doctrine is denied for leases in important common law states such as Massachusetts, New York, Illinois, Ohio, Virginia and Maine (Opinion Note 3), but affirms its application in Missouri. It overrules for Federal Courts the latest expressions of the Missouri Supreme Court *En Banc* without dignifying them by comment (Argument, Points I and II).

The novelty of plaintiff's suit perhaps intrigued the attention of the courts below so that only the right of plaintiff to maintain his action was deemed important. Incidental minor consideration only was accorded to all substantive, absolute, affirmative defenses pleaded, which were so self-evident under Missouri law that petitioner

deemed it a useless formality to proceed with a declaratory action in the Missouri courts to have them so established. There they would be readily recognized and enforced. There also the lease would be enforced as the parties contracted and not as re-fashioned only by authority of the complaint.

From the opinion (Tr. 101) we quote:

> "Some minor contentions also are raised by defendant but we do not regard any of these as controlling and they will, therefore, be referred to only briefly and incidentally."[1]

Most of the evidence (heard by the court without a jury) was presented by agreed statement (Tr. 40-48). Jurisdiction was based on diversity of citizenship and a purported amount in controversy (Tr. 1). That real jurisdiction was lacking is shown by argument, Point I. The first count of the complaint prayed for $19,885.80 as commuted value at 4% interest for thirty years rent in advance, less present commuted rental value (Tr. 3). The second count sought $11,678.32 for estimated future taxes for thirty future years likewise commuted at 4% interest (Tr. 4). The lease (Tr. 4-24) contains no provision for liquidation or commutation of future payments and has no interest or other formula to conform to the complaint or judgment rendered. State law provides none. Only $400 rent had accrued, if any was due after surrender.

The lease contains no covenant to accelerate rent or taxes and none for damages or indemnity to survive reentry or termination. The balance of the term if not terminated was 68 years. Judgment was for a total of

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[1]The situation was not invited. Petitioner briefed and argued his substantive points first and protested the classification (Tr. 117-118) in his petition for re-hearing, without avail. State rules of property declared by its courts are indeed without integrity if they may be brushed aside as "minor" with incidental rather than real consideration. This is denial of equal protection of laws and approaches closely to denial of due process of law.

$13,357.52, computed on ten years future rent and taxes (Tr. 48-49).

The lease was made in 1909, by Esther Gaston (who devised two-thirds interest in the lot to respondent upon her death in 1918), as lessor, and petitioner and his brother, as lessees (Tr. 81, 4-24). The other one-third of the fee, devised to Emma Brockman (Tr. 2), was purchased in 1918 by lessees, thus merging the fee and lease to that extent. Annual rent payable quarterly was reserved at $600 for the first five years; at $1,800 for the next fifteen years and at $2,400 from January 1, 1929, and thereafter.

All sums due to June 30, 1940, were fully paid by lessees, when after giving prior written notice (Tr. 47, Par. 16; 41-46, Pars. 7-12) of such intention, the premises were surrendered with claim of right so to do (Par. 13, Tr. 46) under lease provision (Tr. 15, Par. 15) reading:

> "* * * Provided that after the new building shall have been constructed, the personal liability of the lessees hereunder may be terminated by lessees having complied with all the terms and conditions of this lease which at that time lessees shall have agreed to perform, and by the lessees surrendering to the lessor the premises, the improvements thereon and the possession thereof."

The "new building" is defined in the lease (Tr. 9, Par. 10; 21, Par. 42) and was to be erected and paid for by lessees before January 1, 1914 (Tr. 21, Par. 41). Penal bond of $6,000 delivered concurrently guaranteed erection as agreed. Right of forfeiture was reserved (Tr. 15, Par. 23) as a lease remedy for breach of building or other covenants. Because of the elective alternative types of structures (Tr. 21, Par. 41) authorized, the lease recognized the building covenant was not enforceable by specific performance. Damages would be difficult to ascertain for the same reason. Therefore, $6,000, guaranteed by bond, fixed damages for possible breach. The building

covenant was not a continuing one but had to be either performed or breached on January 1, 1914 (Tr. 9, Par. 10).

If the building was completed during the optional period before 1914, lessees could terminate thereafter and before 1914. After 1914, erection was immaterial to exercise the surrender right to terminate further personal liability because on the mandatory building date, lessor was entitled to either have the building completed or collect the $6,000 bond with the additional lease right to forfeit for breach. No agreement provides for double recovery. *Lessor could not enforce the bonds and also require the building or again recover damages in addition to the bond if erection was not completed.* Obviously, by any construction, *on January 1, 1914, with the building covenant breached, lessees could pay the bond and all lease sums then due and surrender the premises to terminate further personal liability.* Lessor had the same reciprocal right. The answer pleaded that the building covenant was independent under Missouri law and did not form the entire consideration (Tr. 28, Par. 23). Its breach was made expressly compensable in damages fixed by and payable under the bond. The sole possible purpose of providing for both lease and bond was to protect lessor and allow her to recover on the bond if the lease was terminated for default prior to 1914 with its unaccrued covenants thereby discharged.

The original lessor was a Kansas City resident and knew the facts on January 1, 1914. It is clear from the admitted circumstances that she exercised her wisdom (although we admit the record is barren of direct evidence) and desired rent income payable at a rate three times the amount for the first five years and wanted to continue to have her taxes paid, rather than have any of the alternative kind of buildings erected, or even to collect her bond with loss of tenants. She knew from the lease that (Tr. 21, Par. 42) lessees owned the adjoining lot. If the property developed so a building would not be a liability, erection would follow by operation of economic

law. If it did not develop, she wanted no building to be surrendered, to be a liability to her. The building covenant thus was not extended by agreement. With full knowledge of breach, no collection of the bond was sought. That was inducement to the tenants to continue and pay the increased rental. Rent was accepted thereafter throughout her lifetime and subsequently to 1939 without ever a demand to build or pay the bond. The wisdom is manifest. The rent and taxes paid exceeded the amount of the bond many fold. The building was forever waived. By Missouri law duly pleaded (Tr. 31) (but disregarded by the courts below) that was equivalent to performance, beneficial to lessor (Argument, Point IV).

Respondent's devise in 1918 was two-thirds of the land without reference to lease or bond (Tr. 81). On its breach in 1914, the bond vested in lessor and at her death passed not to respondent but to her executors. He took the land subject to a lease with a fixed contract right of surrender and with the 1914 building covenant discharged by acts of the original contracting parties.

In 1939, respondent expressly affirmed the independent nature of both building covenant and bond. He filed suit Number 424, on that theory in the same District Court (Tr. 32-36). His first count alleged breach of lease covenants by failure to build by January 1, 1914, and prayed specific performance or alternative recovery of $27,500. He alleged he was two years old in 1918 when his two-thirds interest in the real estate was devised to him and that the statute of limitations was tolled until he reached his majority. His second count prayed for the $6,000 penalty of the bond. Motion to dismiss was filed because his complaint failed to state a claim on which relief could be granted (Tr. 36-39). It was sustained on both counts. The order of dismissal said the petition on its face showed that the statute of limitations had run against counts one and two (Tr. 81). The order specified nothing to the contrary so it operated as an adjudica-

tion on the merits under Rule 41 (b) of Federal Rules of Civil Procedure. No appeal was taken. The judgments became final. They are admitted by agreed statement (Par. 5, Tr. 41), and were pleaded in bar (Tr. 26) as *res judicata,* election of remedies (Tr. 27-31); waiver; estoppel by judgment and discharge of covenants by judgment and of conditions claimed. Discharge by reason of the common law rule that severance of the reversion and merger of title of part of lease and fee discharged a condition, if building was a condition for surrender, was also pleaded. The courts below (Tr. 94 and 101), by designating all substantive defenses as "minor" refused to consider the plea of these judgments as *res judicata,* estoppel or as a final adjudication on the merits and gave them no more effect than as a statute of limitations. To render the judgments, the District Court necessarily had to find as a basis that the building covenant was independent; that it was capable of only one breach and was not a continuing covenant; that performance and bond payment was waived and barred so no action could be maintained thereon. Under controlling precedents of this Court and the Missouri courts (to the citation of which no reference is made) these judgments were conclusive on the matters affirmatively pleaded by answer (Argument, Point III).

The shocking result and denial of due process by refusal to do more than to incidentally consider as "minor" the facts affirmatively pleaded and indisputably established by agreed statement more clearly appears because the judgments here rendered will conclude petitioner under the same rules of *res judicata* and estoppel which he pleaded (and which were denied to him) from relying on the judgments adverse to respondent and on the facts concluded thereby, in establishing substantive defenses in a connected case filed by respondent against petitioner on the same lease.

Count 3, in District Court Case No. 424 (Tr. 27), was tried by jury and verdict was directed for petitioner

against respondent on the basis of release "Exhibit C" (Tr. 39-40). Respondent appealed from the judgment on that count (Par. 16, Tr. 47). It was reversed for a new trial. Certiorari was sought by this petitioner in that case because reversal was based only on an inference first drawn in the opinion on appeal without support of and contrary to the record. There was no agreed statement so different viewpoints were possible in that case. Certiorari was denied October 13, 1941, in Number 183 by this Court at this term.

That case is now remanded for a new trial. Estoppel by the judgment in this case based only on doctrines contravening declared Missouri law, concludes substantive defenses otherwise there open to him.

The situation insistently demands review. Without it due process and equal protection of laws is not accorded to petitioner.

The existing situation, of course, was not contemplated nor intended by the Circuit Court of Appeals. Motion for rehearing was overruled here before certiorari was denied in Number 183. This court alone may protect and secure to petitioner his constitutional guarantees.

After suffering such adverse final judgments, respondent abandoned his original ideas and filed this complaint in which he affirms a surrender of the premises (Tr. 2) by lessees but says it was "repudiation" of the lease in its entirety without just cause. The opinion holds with him (Tr. 112).

His suit necessarily recognized termination of the lease. By Missouri law respondent's reentry and renting of the premises to mitigate his anticipatory damages, without notice that re-entry was for the tenants' benefit and not for the landlord's and that the landlord would hold the tenants for any loss or deficiency in rents (Tr. 46, 47), discharged the lease and all future covenants. Such Missouri law denies possibility of anticipatory breach of lease rent covenants payable in future installments.

The judgment below directly overrules the latest rulings of the Missouri Supreme Court, *En Banc*, on the same contentions (Argument, Points I and II).

The agreement statement (Tr. 41-43) establishes that in giving notice of intention to surrender, petitioner was acting in good faith under advice of counsel who joined in signing the notice which expressly specified:

> That the building covenant was an independent covenant; that it was so recognized by suit of respondent filed thereon; that the covenant was waived and is not now a covenant in the lease; that the lessees have and are given the right to surrender to terminate further personal liability.
>
> Notice of June 25, 1940 (Tr. 44-45), expressly states that all terms and conditions binding on the lessees were fully performed and that surrender would be made on June 30, 1940, to terminate further personal liability of lessees and that such surrender would be made free from and discharged of said lease; that all obligations were performed as established by judgment and decree of the United States District Court in case No. 424.

The entire record in that case is included in the agreement statement (Tr. 41) and the judgments rendered therein are expressly pleaded by answer (Pars. 14-33; Tr. 26-31).

Despite Missouri law and decisions of this Court that good faith assertion of rights is not repudiation of the contract, even though the contentions advanced are wrong, the opinion holds unjustifiable repudiation crystallized inchoate contingent future installment payments belonging only to the owner of the reversion at the time they accrue, into present existence to be paid to plaintiff, attenuated only by an interest rate of his selection.

Respondent leased his interest in the premises to another tenant. This constituted re-entry and discharged the lease. The details are reviewed under Argument, Point I.

Recovery was allowed respondent on a discharged lease, which contained no contractual provision to survive termination. Recovery was under a complaint not supported by his lease.

B.

STATEMENT OF THE BASIS FOR JURISDICTION.

(a) The writ of certiorari is applied for under Rule 38 of this Court and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347 (a)), and is the proper remedy.

(b) The date of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit affirming judgment of the District Court is September 22, 1941 (Tr. 113; opinion same date, Tr. 100). Motion for rehearing was filed October 3, 1941, and was overruled October 11, 1941, without opinion (Tr. 131-133).

(c) The following cases also sustain jurisdiction:

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Klaxon Co. v. *Stentor Elec. Mfg. Co.*, 312 U. S. ....., 61 S. Ct. 1020.

Griffin v. *McCoach*, 312 U. S. ....., 61 S. Ct. 1023.

Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860.

(d) The opinion is printed (Tr. 100-113) but not yet reported. Order was entered October 18, 1941, for stay of mandate for thirty days to permit filing this petition (Tr. 134).

C.

QUESTIONS PRESENTED.

1. Where the amount in controversy in a diversity of citizenship case could not exceed $400 for rent for the July quarter if surrender of the lease sued on was accepted

and Missouri law was declared and applied and all liability was discharged if surrender of the lease was accepted, did the lower courts acquire any real jurisdiction by applying the doctrine of anticipatory repudiation to unaccrued lease covenants to enter judgment for $13,357.52, when the Missouri Supreme Court, *En Banc*, and its appellate courts have consistently declared the doctrine does not apply to Missouri leases? Was this denial of due process?

2. Did the courts below accord petitioner equal protection of laws in entering and affirming judgment of $13,357.52 on a Missouri 99-year lease on the theory of anticipatory repudiation of unaccrued covenants, when the doctrine has been consistently denied for leases by the Missouri Supreme Court, *En Banc*, and its appellate courts?

3. Was petitioner accorded equal protection of laws by the entry and affirmance of judgment for $13,357.52 on a Missouri 99-year lease on the theory of anticipatory repudiation of unaccrued covenants, where he surrendered the premises under claim of right based on a lease provision and the landlord accepted surrender, rented the premises to a new tenant and pleaded the surrender as "repudiation," and where the highest Missouri appellate courts have consistently held that even after an unjustified abandonment or surrender of leased premises the acceptance thereof or a re-entry discharges all liability for damages on unaccrued lease covenants?

4. Under the circumstances disclosed in the three foregoing questions, was the petitioner accorded equal protection of laws under Constitution of the United States, Art. IV, Sec. 2, and the Fourteenth Amendment, and was he denied due process of law?

5. Did the lower federal courts disregard the doctrine of *Erie R. R. Co.* v. *Tompkins*, where they refused to give the same effect to a federal district court judgment that would be given to the same judgment by the Mis-

souri courts if it was pleaded in the same way, as being *res judicata* and as constituting estoppel and election of remedies?

6. Did the lower federal courts repudiate the doctrine of *Erie R. R. Co.* v. *Tompkins*, where they refused to construe a Missouri lease according to Missouri law and refused to apply the Missouri law of waiver, and its law as to the effect of independent covenants, in accordance with controlling decisions of its appellate courts, and erroneously applied principles declared for and limited to option agreements which had no application to independent covenants?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The doctrine of *Erie R. R. Co.* v. *Tompkins* was not observed and the applicable state law was not declared and applied. Petitioner was not accorded equal protection of laws nor due process of law guaranteed under Constitution of the United States, Art. IV, Sec. 2, and under the Fourteenth Amendment, in that:

1. The total amount in controversy did not exceed $400 if Missouri law was declared and applied. If surrender of the lease was accepted by withdrawal of notice of non-acceptance and by re-renting to a new tenant and by affirmatively accepting a surrender as asserted "repudiation" by the complaint filed, all liability for unaccrued covenants was discharged under Missouri law. If it was not accepted, the highest possible recovery under state law was $400 for rent for the July quarter. The courts below were without real statutory jurisdiction. Apparent statutory jurisdiction was usurped by denying equal protection of laws and due process of law in refusing to follow Missouri law as declared by its Supreme Court, *En Banc*, and by its appellate courts, which have consistently denied application of the doctrine of antici-

patory repudiation to unaccrued lease covenants (Argument, Points I and II).

2. Equal protection of laws guaranteed to Petitioner by Constitution of the United States, Art. IV, Sec. 2, and by the Fourteenth Amendment, was denied by the judgment and decision below, where federal courts refused in a diversity of citizenship case to follow Missouri law as consistently declared by its highest courts that acceptance of surrender or actual or constructive re-entry after abandonment discharges all unaccrued covenants of a lease. Although surrender was accepted and re-entry was made, and the complaint pleaded an accepted repudiation (which discharged the lease), the courts below, in direct disregard of Missouri controlling cases which are not even mentioned in the opinion, held that the doctrine of anticipatory repudiation applied and entered judgment accordingly, although the lease contained no covenant to survive re-entry, and no covenant to support the complaint (Argument, Points I and II).

3. The courts below refused to apply the doctrine of *Erie R. R. Co.* v. *Tompkins* and refused to recognize or apply Missouri law as declared by its highest courts in failing to give the same effect to a federal district court judgment that would be given to it by the Missouri courts when it was pleaded as *res judicata*, estoppel and as an election of remedies (Argument, Point III).

4. The judgment and decision below likewise refused to construe a Missouri lease in a diversity of citizenship case according to Missouri law as declared by its highest courts and refused to declare and apply the Missouri law of waiver, and its law on the construction of independent covenants in the lease, and erroneously applied principles of law declared for and limited to option agreements, which has no application under Missouri law to independent covenants (Argument, Point IV).

5. The basic principles of Missouri Landlord and Tenant Law and the declared social and economic public policy of the State were set aside on important questions of local law, in direct conflict with controlling decisions of the Supreme Court of Missouri, *En Banc.*

E.

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a Writ of Certiorari be issued under seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the case of *Axel Hawkinson, Appellant,* v. *George Gaston Johnston, Appellee,* No. 11939, and *George Gaston Johnston, Appellant,* v. *Axel Hawkinson, Appellee,* No. 11943, to the end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States; and that the findings of said Circuit Court, to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

Axel Hawkinson,
Petitioner,

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